In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-652

ESTATE OF JOAN WERSETSKY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the decision of the court of appeals holding that the Tax Court did not abuse its discretion in dismissing its case for want of prosecution. Petitioner, acting through its administrator Joseph Wersetsky, filed a petition in the Tax Court for redetermination of a deficiency in income taxes. After receiving notice of the date of the trial, petitioner failed to appear for trial. The Tax Court granted the Commissioner's motion to dismiss (Pet. Ex. C) and the court of appeals affirmed (Pet. Ex. A).

Briefly, the pertinent facts are as follows. On January 24, 1972, the Commissioner issued to petitioner a statutory notice of deficiency in federal income taxes for the years 1967, 1968, and 1969, in care of Joseph Wersetsky, as Administrator. On April 7, 1972, petitioner mailed a letter to the Tax Court requesting a

copy of the rules for filing a petition with that court (Pet. Ex. G). Petitioner enclosed a copy of the January 24, 1972 notice of deficiency. On April 10, 1972, petitioner's letter was received and filed by the Tax Court as a tentative petition for redetermination, subject to a requirement that the petitioner file a proper petition in accordance with the Rules of the Tax Court within 90 days thereafter.

In response to the Tax Court's action, on May 22, 1972, petitioner filed an amended petition prepared in accordance with Rule 7 of the Rules of Practice of the Tax Court and enclosed the required filing fee of ten dollars. After at least two pretrial conferences and two continuances, the case was called for trial on May 25, 1973. However, petitioner failed to appear for trial.

Prior to the time when the Commissioner moved to dismiss for want of prosecution, the court had stated that petitioner had also failed to appear at an additional pretrial conference scheduled for May 22, 1973, and that, on May 21, 1973, the court had personally informed petitioner that the trial was set for May 25, 1973. In addition, the Commissioner's counsel stated that he had dispatched a telegram to petitioner confirming the date and time of the trial (Appendix A, *infra,* pp. 1a-2a). After hearing the Commissioner's presentation of evidence relating to the determination of the income tax deficiencies, the Tax Court granted the Commissioner's motion to dismiss for want of prosecution (Pet. Ex. C).

1. Dismissal for failure to prosecute is a matter within the discretion of the trial judge, whose action must be sustained unless there has been an abuse of discretion. *Link* v. *Wabash Railraod Co.*, 370 U.S. 626, 630-631. Rule 27(c) of the Rules of Practice of

the Tax Court provides that a case may be dismissed for failure properly to prosecute or that a case may be regarded as submitted by a party whose absence is unexcused. Here, after having been informed of the trial date by both the presiding judge and the Commissioner's trial counsel, petitioner failed to appear at the trial on May 25, 1973. There was accordingly nothing arbitrary or unreasonable in the Tax Court's dismissal of the case.

Petitioner argues (Pet. 8-9), that he failed to attend the trial scheduled for May 25, 1973, because (1) the stipulations proposed by the Commissioner's trial counsel at pretrial conferences "were detrimental to Petitioner's rights and privacy and would jeopardize Petitioner's position to prevail" and (2) the Tax Court Clerk failed to notify him of the place, date, and time the trial would be called under Tax Court Rule 27(c)(1). Whatever petitioner's objections may have been to the stipulations offered by the Commissioner, his unwillingness to stipulate does not excuse his failure to prosecute his case.

Petitioner received adequate formal notice of the setting of his case for trial. As reflected by the Tax Court docket entries, the Clerk of the Tax Court sent petitioner on January 29, 1973 a notice of the place, date, and time of the trial. Although the trial date was subsequently twice continued, petitioner was personally present on each occasion when this was done. In addition, the Commissioner's counsel sent petitioner a telegram repeating the information concerning the setting of the trial (Appendix A, *infra*, pp. 1a-2a). Petitioner has not offered any justifiable excuse for his absence at trial.

2. Petitioner further contends (Pet. 6, 10-14) that his petition in the Tax Court was both defective in form and untimely, so that the Tax Court never acquired jurisdiction, and that the Tax Court was further deprived of jurisdiction by his alleged tender of a $25,000 check on August 28, 1970, for "all Federal Income and Federal Estate taxes to date" (Pet. Ex. I). If petitioner is correct that the Tax Court had no jurisdiction over its case, it has in effect conceded that the Tax Court properly dismissed its suit, although for a different reason than it gave.

Petitioner's jurisdictional challenge to the Tax Court's action was fully answered by the court of appeals, upon which we rely, as follows (Pet. Ex. D, p. 2):

> We have reviewed the record, and the memoranda of both parties, and conclude that petitioner's request is frivolous and it is hereby denied. Indeed, most of that of which petitioner complains was brought about by his own actions. His most important complaint is that the Tax Court took jurisdiction of this petition for review of a deficiency assessment illegally, in that his formal petition was not filed until after the 90 day statutory period had run. The Tax Court had accepted a letter from petitioner which requested a copy of the rules for filing and which was received shortly before the 90 days had run as a "tentative petition." It had done this in order to give the petitioner an opportunity to file in proper form, since the 90 days would otherwise have barred the petition. Having taken advantage of what can only be considered an effort by the Tax Court to bend the rules in the interest of justice, petitioner cannot now complain.

See also *Fiorentino* v. *United States*, 226 F. 2d 619, 621 (C.A. 3); *Continental Petroleum Co.* v. *United States*, 87 F. 2d 91, 94-95 (C.A. 10), certiorari denied, 300 U.S. 679.

Petitioner's argument (Pet. 6, 13-14) that the Tax Court had no jurisdiction because of its alleged tender of a $25,000 check for "all [Federal] income and federal estate taxes to date [August 28, 1970]," is equally without merit. There was no evidence admitted by the Tax Court which would support petitioner's allegation that it tendered such a check. But even assuming *arguendo* that petitioner did so, the Commissioner's acceptance would not have effected a compromise of petitioner's federal income tax liabilities. Under Section 7122 of the Code (26 U.S.C.), a tax liability can be compromised by the Commissioner only after an official statement of the terms of the compromise and the reasons in support of it have been made. See *Rosenman* v. *United States*, 323 U.S. 658; *Moskowitz* v. *United States*, 285 F. 2d 451 (Ct. Cl.). No such administrative steps have been taken in this case. Accordingly, no compromise agreement under a general theory of accord and satisfaction can be imputed to the Commissioner. *Hughson* v. *United States*, 59 F. 2d 17 (C.A. 9), certiorari denied, 287 U.S. 630; *Moskowitz* v. *United States, supra.*

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

APPENDIX A

THE CLERK: Docket Number 2569-72 Estate of Joan Wersetsky, deceased, Joseph Wersetsky, administrator.

MR. SILHASEK: James Silhasek for the Respondent, Your Honor.

(Pause.)

THE COURT: Mr. Wersetsky is not present?

MR. SILHASEK: No, Your Honor.

THE COURT: I wish to state for the record that Mr. Wersetsky was instructed to come to a pretrial conference in my chambers at two o'clock on Tuesday afternoon, he did not make an appearance at that time, that on Monday, while he was present in the courtroom, this trial was set for ten o'clock on Friday morning, and he is not present at this time. We will proceed with the government's fraud part of the case.

MR. SILHASEK: Your Honor, there is no fraud part to the case.

THE COURT: Is there no fraud? I thought there was a fraud penalty involved here.

MR. SILHASEK: There is negligence for failure to file and to pay tax, a negligence penalty, Your Honor.

THE COURT: I see. All right, Mr. Silhasek, do you have a motion to make?

MR. SILHASEK: Yes, Your Honor. At this time, I would like to file a motion to dismiss for lack of prosecution, and in support of that, and in addition to what is stated in the motion, we have attempted to notify the representative of the Petitioner by telephone, but we were

unable to reach him. We did, however, send a telegram to his residence, reminding him that the trial was to take place today, a copy of which was sent to your office, and in support of this motion, if you wish, we will put on the Respondent's portion of the case.

THE COURT: I know, Mr. Silhasek, that you have brought witnesses from Boston for the purpose of this trial, and I am favorably inclined to your motion. I will hold ruling on your motion, and you may put your witnesses on. We will hear your witnesses.

MR. SILHASEK: Okay. Thank you, Your Honor.

THE COURT: And I will determine later on ruling on the motion.

MR. SILHASEK: Would you like for me to make an opening statement, Your Honor? May I?

THE COURT: Yes, you may.